

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JUAN DAVILA-BAJANA,)	Case No. 04-253E
)	
Plaintiff)	Judge McLaughlin, U.S.D.J.
)	
vs.)	Magistrate Judge Baxter, U.S.M.J.
)	
TIM HOLOHAN,)	
)	
Defendants.)	

PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION OF MAY 9, 2006

AND NOW COMES, the Plaintiff, Juan Davila-Bajana, and appearing pro se, hereby respectfully files his Objections to the Magistrate Judge's Report and Recommendation dated May 9, 2006 ("R&R"). In support of said objections, Plaintiff avers as follows:

- I. Plaintiff properly raised his Eight Amendment Claim.

In the R&R, the magistrate judge determined that it was unclear whether Plaintiff had fully exhausted his Eighth Amendment claim alleging exposure to tobacco smoke and silica dust. R&R at pp. 6-7. Contrary to the Government's disingenuous objections filed herein, Plaintiff has exhausted all of his required administrative remedies in this matter. (see Attached Exhibits). Plaintiff filed (1) Administrative Remedy Informal Resolution Worksheet; (2) Request for Administrative Remedy BP-229(13); (3) Regional Administrative Remedy Appeal BP-230(13); and (4) Central Office Administrative Remedy Appeal BP-231(13). Therefore, it is evident that the Government has lied to this Court regarding the Plaintiff's exhaustion of his administrative

FILED
JUN 20 10:40 AM '06

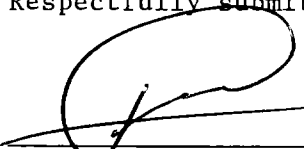
remedies. Plaintiff has exhausted all required administrative remedies in this matter. see McCarthy v. Madigan, 112 S.Ct. 1081, 1085, 1090-91 (1992)(describing procedures).

As a pro se litigant, the Plaintiff is not required to state in his request for administrative remedies that he is filing a claim under the Eighth Amendment. It is clear from making that claim that the Eighth Amendment may be implicated. Plaintiff is not required to cite specific constitutional amendments or statutory requirements in order to protect his rights and properly present his claims. This would violate the pro se liberal construction rule and make unknowledgable inmates know requirements that they simply cannot be expected to know. As long as an administrative remedy and the subsequent legal pleading can be reasonably read to support a claim, then that claim should stand. Haines v. Kerner, 404 U.S. 519 (1972); Boag v. MacDougall, 454 U.S. 364 (1982).

WHEREFORE, facts and premises considered, this Court should allow this case to proceed, at least on the First and Eighth Amendment claims to unlawful exposure to ETS.

Dated: June 15, 2006

Respectfully submitted:



Juan Davila-Bajana
Reg. No. 47580-053
FCI McKean
P.O. Box 8000
Bradford, PA. 16701-0980

PLAINTIFF pro se

U.S. Department of Justice

Central Office Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: DAVILA-BAJANA JUAN 47580-053 BA MCKEAN
 LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A—REASON FOR APPEAL

On 4/8/03, I filed administrative remedy complaint about my ailments due to UNICOR excessive secondhand smoke (ETS) and silica dust. In retaliation for complaining about UNICOR ETS etc., I was fired from UNICOR.

On 4/29/03, I had a meeting with the Safety Manager, UNICOR Factory Manager, Mr. Sapko, Mr. Holohon and Mr. Klark. They coerced me to withdraw my administrative remedy against UNICOR for the ETS etc. In return I was promised to be reinstated to to my UNICOR job in the Dayshift instead of nightshift, because the so-called ETS is better managed in the dayshift. The aforementioned individuals told me that they have talked to Ms. Forsyth and she will reinstate me to my UNICOR job. Between May 1-May 27, 2003, I repeatedly talked to Ms. Forsyth in the Mainline and in UNICOR, and she repeatedly told me that she will reinstate me in UNICOR before she departs to her new job. She deliberately left without keeping to her promise.

RELIEF:

I want to be reinstated to my UNICOR job.

9/12/03
 DATE


 SIGNATURE OF REQUESTER

Part B—RESPONSE

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 304411-711

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____
 LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: _____

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

BP-231(13)
 APR 11 1993

Administrative Remedy No. 304411-A1
Part B - Response

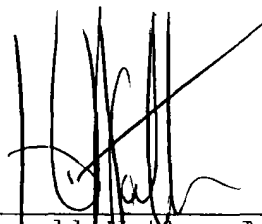
This is in response to your Central Office Administrative Remedy in which you contend you were removed from your UNICOR job assignment in retaliation for filing a complaint regarding excessive secondhand smoke and silica dust. You contend you were coerced to withdraw the Request for Administrative Remedy and promised, in return, reinstatement in UNICOR. As relief, you request to be reinstated.

Program Statement 8120.02, FPI Work Programs for Inmates, outlines the guidelines for inmate hiring, benefits and termination. The Superintendent of Industries (SOI) may remove an inmate from FPI work status according to the conditions outlined in the pay and benefits section of this policy.

Our review reveals the Warden and the Regional Director have adequately addressed the issue you raise in your appeal. As noted by the Regional Director, you were removed from your UNICOR position because of activities deemed to interfere with the safe and orderly running of the factory. We find the SOI's actions appropriate, within her discretion, and in compliance with the above-referenced policy. Moreover, you do not provide, nor do we find, any evidence to support your claim that your termination was retaliatory or otherwise improperly motivated. Finally, our findings indicate you voluntarily withdrew the administrative remedy in question, without any stipulations or conditions. You were not advised that you would be reinstated, as you have alleged.

Based on the foregoing, your appeal is denied.

November 17, 2003
Date




Harrell Watts, Administrator
National Inmate Appeals *10*

CERTIFICATE OF SERVICE

I do hereby certify that on this the 15th day of June, 2006, I placed in the U.S. Mail, first-class postage prepaid, a true and correct copy of the foregoing pleading and attached exhibits for delivery to:

Mr. Paul D. Kovac, Esq.
Assistant U.S. Attorney
U.S. Post Office & Courthouse
700 Grant Street, Suite 400
Pittsburgh PA 15219



Juan Davila Bajana

U.S. Department of Justice

Regional Administrative Remedy Appeal

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: DAVILA-BAJANA JUAN 47580-053 BA/MCK MCKEAN
 LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A—REASON FOR APPEAL

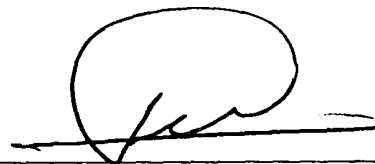
On 4/8/ 03, I filed administrative remedy complaint about my ailments due to UNICOR excessive secondhand smoke (ETS) and silica dust. In retaliation for complaining about UNICOR ETS etc., I was fired from UNICOR.

On 4/29/03, I had a meeting with the Safety Manager, Unicor Factory Manager, Mr. Sapko, Mr. Holohon and Mr. Klark. They coerced me to withdraw my administrative remedy against UNICOR for the ETS etc, in return, I was promised to be reinstated to my UNICOR job in the Dayshift instead of nightshift, because the so-called ETS is better managed in the dayshift. The aforementioned individuals told me that they have talked to Ms. Forsyth and she will reinstate me to my UNICOR job. Between May 1-May 27, 2003, I repeatedly talked to Ms. Forsyth in the Mainline and in UNICOR, and she repeatedly told me that she will reinstate me in UNION before she departs to her new job. She deliberately left without keeping to her promise.

RELIEF:

I want to be reinstated to my UNICOR job.

7/28/03
 DATE


 SIGNATURE OF REQUESTER

Part B—RESPONSE

7002 0860 0007 8964 0986

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 304411-R1

Part C—RECEIPT

CASE NUMBER: _____

Return to: _____
 LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: _____

FILED DATE

SIGNATURE, RECEIPT OF REGIONAL APPEAL

BP-230(13)
APRIL 1993

DAVILA-BAJANA, Juan

Reg. No. 47580-053

Appeal No. 304411-R1

Page One

Part B - Response

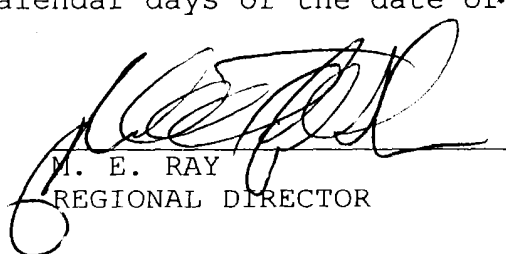
In your appeal, you state you were fired from the UNICOR factory because you filed an administrative remedy regarding secondhand smoke in the factory. You are asking to be reinstated to your job in UNICOR.

A review of your appeal revealed that, although you filed an administrative remedy concerning the alleged secondhand smoke in the UNICOR factory, you withdrew your administrative remedy without any conditions or stipulations. You were informed, if you were interested in being reinstated to UNICOR, you would have to speak with the Superintendent of Industries regarding this matter. The Superintendent of Industries informed you that you were removed from the UNICOR factory because of activities deemed to interfere with the safe and orderly running of the factory. She informed you that your status would be reevaluated for future hiring. You were not given a guarantee that you would be reinstated immediately.

The Occupational Safety and Health Administration (OSHA) recently inspected the UNICOR factory for air quality and other work-related potential hazards. The findings indicate no evidence of any concerns related to the general air quality within the factory. OSHA's final report has been posted in UNICOR for review by staff and inmates, in accordance with OSHA guidelines. Accordingly, your appeal is denied.

If you are dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedy Section, Office of General Counsel, Federal Bureau of Prisons, 320 First Street, N. W., Washington, D. C. 20534, within 30 calendar days of the date of this response.

Date: August 29, 2003


M. E. RAY
REGIONAL DIRECTOR

U.S. DEPARTMENT OF JUSTICE

REQUEST FOR ADMINISTRATIVE REMEDY

Federal Bureau of Prisons

WARDEN'S OFFICE

Type or use ball-point pen. For attachments and fees, submit four copies. Additional instructions on reverse.

From: DAVILA-BAJANA JUAN 03 JUL -8 PM 1:58 47580-053 BA MCKEAN
 LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A- INMATE REQUEST

On 4/8/03, I filed Administrative Remedy complaining about my ailments due to UNICOR excessive secondhand smoke. In retaliation for complaining about UNICOR complaining about UNICOR secondhand smoke, and about the health problems caused by UNICOR ETS, I was fired from UNICOR.

On 4/29/03, I had a meeting with Safety Manager, Mr. Sapko, Mr. Holohan and Mr. Clark. They coerced me to withdraw my administrative remedy against UNICOR for the secondhand smoke and in return I was promised to be reinstate to my UNICOR job in the Daysift instead of Nightshift. They claimed smoking is better managed in the DayShift. The aforementioned individuals told me that they have talked to Ms. Forsyth, and she will reinstate me to my UNICOR job. Between May 1-27, 2003, I repeatedly talked to Ms. Forsyth in the Mainline, in UNICOR, and she repeatedly told me that she will reinstate me before she depart to her new job. She deliberately left without keeping to her promise.

RELIEF:

Because the above individuals coerced me to withdrew my administrative remedy for secondhand smoke and lied to me that they will reinstate me to my UNICOR job, I am reinstating my claim of the injury I suffered from UNICOR secondhand smoke.

DATE

SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 304411

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____
 LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: _____

DATE

RECIPIENT'S SIGNATURE (STAFF MEMBER)

DAVILA-BAJANA, JUAN
Reg. No. 47580-053
MCK 304411 - F1

PART B - RESPONSE

This is in response to your Request for Administrative Remedy, receipted in my office on July 8, 2003, in which you allege that you were coerced to withdraw an existing administrative remedy regarding secondhand smoke in the UNICOR Factory. You further allege that in recognition of withdrawing your original administrative remedy, you were to be rehired in UNICOR.

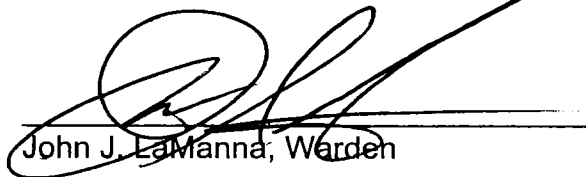
An investigation into your allegations reveals the following: You withdrew your administrative remedy without any conditions. You were told that any attempt to regain your job would be in response to discussions with the Superintendent of Industries. The Superintendent indicated that you were removed because of activities deemed to interfere with the safe and orderly running of the factory; and, at a minimum, your status would be reevaluated in the future for possible rehiring. At no time were you told that you would be rehired.

With respect to your claim of adverse health related to secondhand smoke in the factory, there have been three separate visits by a compliance officer from the Occupational Safety and Health Administration (OSHA). The dates of the visits were Wednesday April 16, 2003, Wednesday May 14, 2003, and from Tuesday June 17, 2003 through Wednesday June 18, 2003. The preliminary findings indicate no evidence of any concerns related to the air quality within the factory. This includes the air quality as it relates to the smoking area within the factory. All appropriate and necessary practices are being followed in accordance with OSHA regulations. A final report will be provided by OSHA detailing the visit and will list any possible recommendations. Upon receipt of a final report, the information will be disseminated in accordance with OSHA guidelines.

Based on these findings your Request for Administrative Remedy is denied.

In the event that you are not satisfied with this response, you may appeal within twenty (20) calendar days from the date of this response by submitting a BP-DIR-230 to the regional director.

7-21-03
Date


John J. LaManna, Warden

ADMINISTRATIVE REMEDY INFORMAL RESOLUTION WORKSHEET

PART 1: NOTICE TO INMATE: Be advised that before filing a Request for Administrative Remedy Form BP-9, you **MUST** attempt to informally resolve your complaint through your Correctional Counselor. Briefly state complaint below, and list what efforts you have made to resolve your complaint informally, stating names of staff contacted.

This Informal Resolution was issued by the Correctional Counselor on _____ and returned to the Counselor on _____ (date). (date)

Inmate's Name VUAN DAVILA BAVANA Number 47580-053 Unit B-A

1. Complaint: _____

PLEASE SEE ATTACHED.

2. Specific relief desired: _____

SEE ATTACHED.

3. Efforts made to informally resolve and staff contacted: _____

SOI UNICOR.

[Signature]
Inmate's Signature

dated 6/12/03

47580-053
Inmate's Register Number

PART 2: CORRECTIONAL COUNSELOR'S COMMENTS:

1. Efforts made to informally resolve and names of staff contacted: _____

ACCORDING TO UNICOR STAFF YOU WILL HAVE TO BE OUT OF UNICOR FOR NINETY DAYS BEFORE YOU WILL BE PLACED BACK IN UNICOR. YOU WILL ALSO LOSE YOUR LONGEVITY. IF YOU HAVE ANY QUESTIONS REGARDING THIS ISSUE, I SUGGEST THAT YOU SPEAK WITH MR. HOLOHAN, UNICOR AT MAIN LINE.

Date informally resolved 6/12/03 BP-9 issued (circle one): _____
Counselor's Signature: T. HOLT, COUNSELOR UNIT BA 6-27-2003

If complaint is NOT informally resolved, forward original attached to BP-229 form to Warden (Attn: Warden's Secretary).

ADMINISTRATIVE REMEDY AGAINST - MS. FORSYTH, MR. SAPKO, MR. ENGLISH,
MR. HOLOHAN, SAFETY MANAGER; MR. CLARK. .

On 4/8/03, I filed Administrative Remedy complaining about my ailments due to UNICOR excessive secondhand smoke. In retaliation for complaining about UNICOR secondhand smoke, I was fired from UNICOR.

On 4/29/03, I had a meeting with Safety Manager, Mr. Sapko, Mr. Holohan and Mr. Clark. They coerced me to withdraw my administrative remedy against UNICOR for secondhand smoke and in return I was promised the reinstatement of my UNICOR job in Dayshift where smoking is better control. The aforementioned individuals told me that they have talked to Ms. Forsyth, that she will reinstate my UNICOR job. Between May 1 - 27, 2003, I repeatedly talked to Ms. Forsyth in the Mainline, in UNICOR, and she repeatedly told me she will reinstate me before she leaves. She lied. She never kept her promised.

RELIEF:

Because the above individuals coerced me to withdrew my administrative remedy for secondhand smoke and lied to me that they will reinstate my UNICOR job, I am reinstating my claim of the injury I suffered from UNICOR secondhand smoke which result to retaliatory termination.

Reinstate my job or reinstate my grievance.

ADMINISTRATIVE REMEDY INFORMAL RESOLUTION WORKSHEET

PART 1: NOTICE TO INMATE: Be advised that before filing a Request for Administrative Remedy Form BP-9, you **MUST** attempt to informally resolve your complaint through your Correctional Counselor. Briefly state complaint below, and list what efforts you have made to resolve your complaint informally, stating names of staff contacted.

This Informal Resolution was issued by the Correctional Counselor on _____ and returned to the Counselor on _____ (date). (date)

Inmate's Name YUAN DAVILA BAVANA Number 47580-053 Unit B-A

1. Complaint: _____

PLEASE SEE ATTACHED.

2. Specific relief desired: _____

SEE ATTACHED.

3. Efforts made to informally resolve and staff contacted: _____

SOI UNICOR.


Inmate's Signature

dated 6/12/03

47580-053
Inmate's Register Number

PART 2: CORRECTIONAL COUNSELOR'S COMMENTS:

1. Efforts made to informally resolve and names of staff contacted: _____

ACCORDING TO UNICOR STAFF YOU WILL HAVE TO BE OUT OF UNICOR FOR NINETY DAYS BEFORE YOU WILL BE PLACED BACK IN UNICOR. YOU WILL ALSO LOSE YOUR LONGEVITY. IF YOU HAVE ANY QUESTIONS REGARDING THIS ISSUE, I SUGGEST THAT YOU SPEAK WITH MR. HOLOHAN, UNICOR AT MAIN LINE.

Date informally resolved at BP-9 issued (circle one): _____

Counselor's Signature: T. HOLT, COUNSELOR UNIT BA 6-27-2003

If complaint is NOT informally resolved, forward original attached to BP-229 form to Warden (Attn: Warden's Secretary).

ADMINISTRATIVE REMEDY AGAINST - MS. FORSYTH, MR. SAPKO, MR. ENGLISH,
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Reinstate my job or reinstate my grievance.

RECEIPT - ADMINISTRATIVE REMEDY

DATE: SEPTEMBER 29, 2003

FROM: ADMINISTRATIVE REMEDY COORDINATOR
BOP CENTRAL OFFICE

TO : JUAN DAVILA-BAJANA, 47580-053
MCKEAN FCI UNT: B QTR: B01-126L

THIS ACKNOWLEDGES THE RECEIPT OF THE CENTRAL OFFICE APPEAL
IDENTIFIED BELOW:

REMEDY ID : 304411-A1
DATE RECEIVED : SEPTEMBER 22, 2003
RESPONSE DUE : NOVEMBER 1, 2003
SUBJECT 1 : UNICOR - ASSIGNMENT, WORKING CONDITIONS
SUBJECT 2 :
INCIDENT RPT NO:

RECEIPT - ADMINISTRATIVE REMEDY

DATE: AUGUST 4, 2003

FROM: ADMINISTRATIVE REMEDY COORDINATOR
NORTHEAST REGIONAL OFFICE

TO : JUAN DAVILA-BAJANA, 47580-053
MCKEAN FCI UNT: B QTR: B01-126L

THIS ACKNOWLEDGES THE RECEIPT OF THE REGIONAL APPEAL
IDENTIFIED BELOW:

REMEDY ID : 304411-R1
DATE RECEIVED : JULY 30, 2003
RESPONSE DUE : AUGUST 29, 2003
SUBJECT 1 : UNICOR - ASSIGNMENT, WORKING CONDITIONS
SUBJECT 2 :
INCIDENT RPT NO:

RECEIPT - ADMINISTRATIVE REMEDY

DATE: JULY 24, 2003

FROM: ADMINISTRATIVE REMEDY COORDINATOR
MCKEAN FCI

TO : JUAN DAVILA-BAJANA, 47580-053
MCKEAN FCI UNT: B QTR: B01-126L

THIS ACKNOWLEDGES THE RECEIPT OF THE ADMINISTRATIVE REMEDY REQUEST
IDENTIFIED BELOW:

REMEDY ID : 304411-F1
DATE RECEIVED : JULY 8, 2003
RESPONSE DUE : JULY 28, 2003
SUBJECT 1 : UNICOR - ASSIGNMENT, WORKING CONDITIONS
SUBJECT 2 :
INCIDENT RPT NO: